NOT TO BE INCLUDED IN BOUND VOLUMES

PGB Orange and East Orange, NJ

## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

BENJAMIN H. REALTY CORPORATION Employer

and

Case 22-RC-087792

RESIDENTIAL CONSTRUCTION AND GENERAL SERVICE WORKERS, LABORERS, LOCAL 55

Petitioner

## DECISION AND DIRECTION

The National Labor Relations Board has considered a determinative challenge in an election held on November 8, 2012, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 6 for and 6 against the Petitioner, with 1 challenged ballot.

The Board has reviewed the record in light of the exceptions  $^1$  and brief, and has adopted the hearing officer's findings  $^2$  and recommendations.  $^3$ 

(2013), this argument is rejected.

The Employer contends that this case should be held in abeyance because the Board does not have a valid quorum

under Noel Canning v. NLRB, 705 F.3d 490 (D.C. Cir. 2013). For the reasons stated in Bloomingdale's, 359 NLRB No. 113

## DIRECTION

It is directed that the Regional Director for Region 22 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Justo Pastor Perea. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings. In adopting the hearing officer's recommendation to overrule the challenge to the ballot of Justo Pastor Perea, we find no merit to the Employer's contention that the hearing officer misplaced the burden of proof on the Employer. The Employer argues that, because the parties stipulated that Perea was a statutory supervisor before the Employer hired Moshe Weiss as its manager in March 2012, the burden of proof is on the Petitioner to affirmatively establish that Perea lost his supervisory authority. Contrary to the Employer's contention, the burden of proof here is on the Employer, as the party asserting supervisory status. NLRB v. Kentucky River Community Care, Inc., 532 U. S. 706, 711-712 (2001). The Board does not apply a burdenshifting analysis to determine whether an individual is a statutory supervisor. Dean & Deluca, 338 NLRB 1046, 1047 (2003). Indeed, similar supervisory status stipulations have not changed the Board's placement of the burden of proof, belying the Employer's contention that this factual situation is unique. See We Can, Inc., 315 NLRB 170, 173-74 (1994); International Metal Co., 286 NLRB 1106, 1115 (1987). As the hearing officer correctly found, the record shows that after the Employer hired Weiss, there was a substantial change in Perea's duties and responsibilities and that the Employer failed to carry its burden of proving that Perea was a supervisor.

Dated, Washington, D.C., June 19, 2013.

	Mark Gaston Pearce,	Chairman
	Richard F. Griffin, Jr.	., Member
	Sharon Block,	Member
(SEAL)	NATIONAL LABOR RELATION	NS BOARD